

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Rules and Policies Concerning)	MB Docket No. 04-256
Attribution of Joint Sales Agreements in)	
Local Television Markets)	

Directed to: The Commission

COMMENTS

PAPPAS TELECASTING COMPANIES

Kathleen Victory
Anne Goodwin Crump

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. 17th Street
Eleventh Floor
Arlington, Virginia 22209
(703) 812-0400

October 27, 2004

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SUMMARY

Pappas Telecasting Companies (“Pappas”), by its attorneys, hereby respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making* in MB Docket No. 04-256, FCC 04-256, released August 2, 2004 (“*NPRM*”). In the *NPRM*, the Commission seeks comment on whether certain joint sales agreements (“JSA’s”) involving television stations should be found to create an attributable interest in the “brokered station” for the broker.

Pappas would urge the Commission not to adopt the same rules for television JSA’s that it has adopted for radio JSA’s. The Commission’s assumptions about the operations of stations subject to JSA’s and the incentives of the licensee of a brokered station are fundamentally flawed. Further, whatever the merits of finding certain radio JSA’s to create an attributable interest, there are sufficient differences in the fundamental methods of operating television as opposed to radio stations to merit different treatment of these services. Indeed, because of substantial differences in the ways in which radio and television advertising time is sold, including the prevalence of network and national representation firm participation, the Commission’s decision could have profound, and perhaps unintended, implications for the television industry as a whole. In addition, television JSA’s have positive benefits for the viability of new or weaker stations in a market that more than outweigh any slight harm that JSA’s may cause to the level of competition in a market.

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Pappas Telecasting Companies (“Pappas”), by its attorneys, hereby respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making* in MB Docket No. 04-256, FCC 04-256, released August 2, 2004 (“*NPRM*”). With respect thereto, the following is submitted:

I. Introductory Statement

1. Pappas is the largest privately-owned television broadcaster in the United States, and operates television stations that are affiliates of most of the major television networks. Pappas has more than 30 years of experience delivering quality television programs to local communities in markets of varying sizes. A number of those stations, including its first, were built from start-up or poorly performing stations into successful ventures providing service to their communities. As a result, Pappas can provide current insight into the television industry based upon seasoned knowledge, and these comments are being submitted in that light.

2. In the *NPRM*, the Commission seeks comment on whether certain joint sales agreements (“JSA’s”) involving television stations should be found to create an attributable interest in the “brokered station” for the broker. A JSA is an agreement between the licensee of a

station and another party (the “broker”), which provides for the broker to sell some or all of the advertising time for the station in return for either a fixed fee or a percentage of the revenues from the time sold. The Commission has concluded that radio JSA’s whereby the licensee of one station in a market brokers more than 15 percent of the weekly advertising time of another station in the same market should be found to create an attributable interest in the brokered station. 47 C.F.R. §73.3555, Note 2(k).

3. In so doing, the Commission noted that an attributable interest is one which, while less than controlling, makes the holder likely to urge a licensee to take actions to protect the interests of this holder, and where there is a realistic possibility that such persuasion will affect a station’s programming and other core operational decisions. *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13743-44 (2003), *affirmed in part, remanded in part*, *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004). The Commission further found that because the broker controls the advertising revenue of the brokered station, a JSA has enough potential to convey influence over programming and core operations of the station to warrant attribution. The Commission now is questioning whether it should reach the same conclusion with regard to television JSA’s.

4. Pappas would urge the Commission not to adopt the same rules for television JSA’s that it has adopted for radio JSA’s. The Commission’s assumptions about the operations of stations subject to JSA’s and the incentives of the licensee of a brokered station are fundamentally flawed. Further, whatever the merits of finding certain radio JSA’s to create an attributable interest, there are sufficient differences in the fundamental methods of operating television as opposed to radio stations to merit different treatment of these services. Indeed,

because of substantial differences in the ways in which radio and television advertising time is sold, including the prevalence of network and national representation firm participation, the Commission's decision could have profound, and perhaps unintended, implications for the television industry as a whole. In addition, television JSA's have positive benefits for the viability of new or weaker stations in a market that more than outweigh any slight harm that JSA's may cause to the level of competition in a market.

II. Operation of JSA's

5. It is generally accepted that programming is the very essence of broadcasting. Indeed, the Commission singled out the ability to affect programming as a key factor in determining attribution status, as it noted that attribution rules seek to identify those interests that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions." *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 14 FCC Rcd 12559 ¶ 1 (1999), *on recon.*, 16 FCC Rcd 1097 (2001). Thus, the Commission has highlighted programming above all other core functions of a station as a matter of concern.

6. JSA's by their very nature, however, do not directly involve programming, or if any programming is involved, it is in very small amounts. In Pappas's experience as the parent company of the licensee of a station subject to a JSA, it is the licensee that retains and enforces the right to select and provide all programming for the station. The broker is responsible for selling time subject to commercial acceptance policies established by the licensee and for a one-

hour newscast. The licensee makes all programming selections and schedules all programming. The licensee merely provides the schedule to the broker for informational purposes and does not request or accept advice with regard to that schedule. Further, the licensee produces all promotional announcements for the programming aired. In addition, the licensee carefully monitors the hour-long newscast to ensure fairness, and it monitors all advertisements to ensure compliance with the detailed commercial acceptance policies attached to the JSA. Clearly, therefore, the licensee in this instance has not abandoned any of the core functions typically associated with a licensee's operation of a station.

7. Thus, it is not the case that a licensee that has entered into a television station JSA may simply sit back and be nothing more than an inactive monitor of its station. Such licensees retain programming obligations, such as entering into agreements to broadcast certain shows and network affiliations. It must be noted as well that the Commission's assumption that a licensee of a brokered station will have little incentive to see that the station airs quality and successful programming is not accurate and is contradicted by the actual operations of Pappas's JSA'd station. No matter whether a licensee is receiving a percentage of revenues or a flat fee, if the programming aired on the station does not attract a sufficiently sizable audience, the funds flowing to the station will dry up and the valuation of the station will therefore be lower than it would otherwise. If a broker cannot sell sufficient advertising time at a high enough rate to cover costs and return an acceptable profit, then the JSA will be cancelled in short order. Moreover, in addition to the other licensee functions related to the selection and purchase of programming, if the station is a network affiliate, it is also the licensee which must maintain that relationship with the network.

III. Differences from Radio Operations - Networks and National Representation

8. Indeed, one of the most striking differences between the operations of radio stations and those of television stations is the prevalence of network affiliations among television stations. For network affiliates, a large portion of each day, including a substantial percentage of the advertising time, is controlled by the network. The portions of time during which network programming is aired include those times when the most viewers are in the audience (*e.g.*, “primetime”). Thus, for network affiliates, the presence or absence of a JSA is of little import with regard to significant blocks of time each day.

9. In the case of a network affiliate, it is the network that chooses, produces, schedules, and provides programming to fill substantial parts of the broadcast day. The affiliate licensee has little influence over the choice or content of particular programs or when they are shown, but only the right to pre-empt programs that it finds unsuitable for its audience. Further, if that right is exercised on more than a rare and exceptional basis, negative consequences for the licensee are likely to follow. Thus, networks clearly have substantial influence on the programming of their affiliates. Furthermore, the networks also generally retain the right to sell approximately 50 to 80 percent of the advertising time contained within network programs.

10. For example, Pappas is familiar with the affiliates agreement of the ABC network, the schedule of programs provided by it, and the percentage of advertising time retained for sale by the network.¹ The following sets out the typical weekday schedule of a Pappas ABC network affiliate, together with the percentage of advertising time retained by the network:

¹ The ABC schedule and information are used only as one example; similar arrangements are in place for other networks.

<u>Times</u>	<u>Programming</u>	<u>Percentage of Network Ad. Time</u>
7:00-9:00 a.m.	“Good Morning America”	50%
9:00 a.m.-12:00 noon	Daytime network programming	50% or greater
12:00 noon-1:00 p.m.	Local affiliate programming	0%
1:00-4:00 p.m.	Soap operas	80%
4:00-7:00 p.m.*	Local affiliate programming	0%*
*less half an hour	National news	All but 2 minutes
7:00-8:00 p.m.	Local affiliate programming	0%
8:00-11:00 p.m.	Network primetime programming	80%
11:00-11:30 p.m.	Local news	0%
11:30 p.m.-1:00 a.m.	“Nightline”/”Jimmy Kimmel”	50%
1:00-2:00 a.m.	Local affiliate programming	0%
2:00-5:00 a.m.	“ABC World News Now”	50%
5:00-7:00 a.m.	Local affiliate programming	0%

11. Thus, in a 24 hour day, the network programs 18 hours, or 75 percent of the day. When one takes into account that, during that 75 percent of the day, the smallest percentage of commercial time that the network sells is 50 percent, and that it sells 80% of the time during six hours of programming per day, it is clear that the network is responsible for selling approximately 45 percent of the total commercial spots aired on the affiliate. This combination of providing 75 percent of the programming and selling approximately 45 percent of the total commercial time is not considered as providing the network with an attributable interest in each

of its affiliates, however.

12. A conclusion that this amount of control over a station's programming and commercial time does not create an attributable interest is clearly inconsistent with the finding proffered in the instant NPRM that an attributable interest is created when a broker in a JSA might be able to exercise some amount of influence over 25 percent of a station's programming. The Commission is focusing only on possible horizontal influence and does not examine at all the question of vertical influence exercised by networks or national sales representation firms. While Pappas is not advocating attributing interests in each network affiliate to that network, this inconsistency militates against attribution of television JSA's to so-called advertising brokers.

13. A similar analysis also applies to consideration of the relationships between stations and national representation firms. Since the beginning of the television industry, national representation firms have, on behalf of local stations, sold advertising time on the national spot market. For the typical station, the amount of time sold is generally in the range of approximately 50 percent of the non-network advertising time. Herein lies another distinction between the television and radio industries, as the percentage of radio advertising time typically sold by a national representation firm is much lower, in the range of five to twenty percent. Once again, it is clear that the amount of local advertising time subject to a JSA is quite small.

14. Moreover, the similarities in the structure of the relationships between a licensee and a broker on the one hand or a national representative on the other hand are quite striking. Like brokers in a JSA, the national representation firm sells advertising on behalf of stations subject only to commercial acceptance policies of the station. Further, while the provisions of JSA's vary considerably, most national representation agreements provide that, if a certain amount of

business is not generated, the fee paid goes down, and business beyond a certain level generates a bonus. Therefore, like a broker, the national representative also is taking a market risk based upon the programming aired by the station. National representation firms maintain programming departments, research available programming, and consult with licensees concerning the programming to be aired. These functions are the very types of activities that the Commission has identified as raising concerns about the possible influence of brokers in a JSA. Nonetheless, this relationship is not considered to create an attributable interest for the national representation firm, and no such attribution is proposed. These examples indicate graphically that the Commission must carefully weigh the possible unintended consequences that determining that JSA's create an attributable interest will have on other rules and business relationships.

15. Moreover, it must be remembered that in a number of markets, the networks themselves will have more than one operation, as with the CBS ownership of UPN and the NBC ownership of Telemundo. Thus, the same entity is ultimately responsible for the provision of programming and advertising to two different stations, generally licensed to two different entities in a local market. Similarly, national representation firms have more than one client in many markets. In these cases, the Commission has found no harm in having one entity engage in advertising sales for two stations in a local market, with any attendant economic or other influence that may bring. Clearly, a different finding with regard to television JSA's would be inconsistent with the Commission's previous findings and experience with regard to networks and national representation firms and would therefore require substantial justification.

IV. Implications of Finding Television JSA's Attributable

16. If the Commission were to determine that television JSA's should be treated as

attributable interests, it would be embarking on a slippery slope, the end point of which is not clear. If the Commission were to determine that the mere existence of a commercial time selling arrangement in a JSA creates sufficient indicia of control to warrant attribution, then the same rationale applies also to relationships with networks and with national representative firms. As set forth above, each of these types of entities also is engaged in the selling of station advertising time and, it can be posited, has the ability to exert similar, and often more extensive, influence over the programming of the station. Indeed, the network actually chooses, schedules, and supplies a substantial percentage of the affiliate's programming. Thus, logic would dictate that if JSA's create an attributable interest, network affiliations and national representation agreements should do the same.

17. If it is the Commission's intent to take this path, then it should consider the many issues relevant to creating all such attributable interests in one, new rule making proceeding rather than taking a piecemeal approach. The Commission must consider the substantial effects on the television industry as a whole, as well as the sheer number of new attributable interests that would come into being. Each station would have a veritable plethora of parties holding an attributable interest, including not only the licensee and its principals but also the network, the national representation firm, the broker, and potentially any attributable interest holders in any of those parties. Such an array of parties creates a very real question of precisely whom the Commission considers to be in control of the station - or put otherwise, who's on first?

V. Local Market Incentives

18. Thus, it is clear that in this proceeding, the Commission is focusing only on the possible effects of horizontal, in-market relationships while disregarding the potentially more

powerful influences of vertical relationships. Furthermore, in looking at the horizontal, in-market relationship, it is not clear why holding an interest in another station in the same market would necessarily affect a broker's ability or incentives to influence programming or other core operational matters in any manner that adversely affects the public interest or contradicts the full application of licensees' responsibilities. In either case, the broker has an incentive to sell commercial time as profitably as possible for the brokered station. If it is the broker that is to realize any profit above a set fee, then it has every incentive to want the brokered station to succeed as well as any station that it may own in the market. The incentive to achieve success does not change in either case. Nor is the incentive different for a network's relationship with its affiliates or a national representative firms with its represented stations. Likewise, if that incentive structure conveys the ability to influence programming choices, that influence would be present regardless of whether a broker has another station in the market, or a network has two different affiliates to different networks, or a national representation firm represents more than one station in a market. In any event, the broker, the network, the national representative and the licensee will wish to realize as much profit as possible from the brokered station. Such profit only comes from the sale of advertising which in turn succeeds as a direct result of the audiences attracted by successfully programming a station in a market

VI. Competition Benefits of Television JSA's

19. The Commission has indicated that another reason for treating certain television JSA's as attributable interests is due to concerns about adverse effects to competition in local markets. Far outweighing any such concerns, however, are the substantial benefits, including competitive benefits, that JSA's have provided and can continue to provide in local markets. In

particular, JSA's can help to keep new and/or less dominant stations in a market afloat financially. Keeping financially shaky stations operating obviously helps to increase the level of competition of both viewpoints and advertising outlets in the marketplace.

20. In this regard, it should be noted that many JSA's involve two stations with differing network affiliations and therefore substantially different programming. As a result, that programming is likely to appeal to disparate demographic groups and therefore to attract varying groups of advertisers. Therefore, any negative impact on competition in a market is likely to be limited, and indeed, having a strong seller to offer advertising opportunities to reach a wide range of demographic groups can increase competition in a market and lead to improved programming on the station which is the subject of a JSA

21. Furthermore, competition also can be promoted by providing weaker or new stations with a steady and known income stream. The less dominant station then can go into the market to purchase the best programming and hire personnel based upon the knowledge that it will have a certain amount of funds coming in. In contrast, the normal ebbs and flows of income typical with start-up or less competitive stations make it hard for licensees to make firm plans or contract for programming confidently.

22. These difficulties are compounded by the substantial competition faced by local television stations. Unlike radio stations, local television stations must compete against not only other local stations but also well-established multi-channel video providers ("MVPD's"), including cable television and DBS companies. Thus, the realities of the competitive marketplace are quite different for local television stations than for local radio stations. While radio is beginning to face some competition from satellite radio, that service is now primarily

national rather than local in focus, is precluded from offering local advertising that is not broadcast nationally, and reaches only a small percentage of radio listeners. In contrast, advertisers wishing to reach television viewers have a vast array of channels carried on MVPD's with which they may place their commercial announcements. Local advertisers, which at one time were limited to placing commercial spots on broadcast stations, can now place local spots on virtually any cablecast program, even purely national ones, through local availabilities inserted by MVPDs. Viewer choices and, therefore, advertiser choices, are enormous. This level of competition leaves many weaker and new television stations in a precarious financial condition. By providing weaker stations with financial stability, those stations are allowed to develop and become stronger and more established. As a result, the level of competition can actually be increased rather than decreased by television JSA's.

23. In light of the many other choices afforded local television viewers and advertisers, even if the Commission should decide to find certain television JSA's to constitute attributable interests, currently existing television JSA's should be grandfathered. To do otherwise would severely disrupt the competitive marketplace. Moreover, such actions could spell disaster for weaker stations suddenly forced to go it on their own with uncertain finances. As a result, a number of less competitive stations in small to mid-sized markets would be likely to be forced to go silent. This stilling of a broadcast voice clearly would not promote any competitive interests, whether of differing viewpoints or advertising outlets.

VII. Conclusion

24. In sum, for the reasons stated herein, Pappas urges the Commission to refrain from determining that certain television JSA's constitute attributable interests and, in the alternative, should the Commission decide to find JSA's to confer an attributable interest, to grandfather JSA's that are currently in place.

Respectfully submitted,

PAPPAS TELECASTING COMPANIES

By: /s/ Anne Goodwin Crump
Kathleen Victory
Anne Goodwin Crump

Its Attorneys

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